

Responding Effectively to Endangered Species Act Critical Habitat Rules

The Office of Advocacy has composed these simplified instructions and the attached checklist to assist small entities in reviewing complex critical habitat rules and making themselves heard by agency policy makers. For regular updates on rules currently being considered by agencies, see the Office of Advocacy's website at: http://www.sba.gov/advo/laws/law_regalerts.html.

- **What is “critical habitat,” and how does it affect small businesses?** The U.S. Fish and Wildlife Service (FWS) designates land as “critical habitat” under the Endangered Species Act, protecting the land regardless of whether the species is present or not. If you conduct activity within critical habitat, even on private property, that has a Federal connection (such as stormwater permits or FEMA funds), you must “consult” with the FWS. During this consultation, activity is delayed until FWS is satisfied that the project will not harm the species’ habitat, usually by requiring the project to minimize and avoid take, such as by purchasing other land for conservation. Sometimes, even where there is no Federal connection, state and/or local law prohibits some uses of land in Federally designated critical habitat.
- **How will this particular rule affect me?** Though the proposed rules are long, you will only need to initially determine if: (1) the rule affects the land you are doing business on, and (2) your particular activity would be restricted. First, near the end of every rule, there will be maps and coordinates showing where FWS proposes to designate critical habitat. Review the maps and determine whether you are included in the critical habitat. Then, refer to the first pages of the rule and look for a section titled “Primary Constituent Elements.” The “Primary Constituent Elements” (or PCEs) are the features of the habitat that FWS will likely prohibit modification or removal of, such as trees or brush.
- **If the rule will harm my business, what can I do?** This publication is a “proposed” rule, and it is not yet finalized. FWS is required by law to respond to small business concerns and scientific objections filed in response to the proposed rule. Therefore, you can file written comments with the agency according to the instructions in the proposed rule. The Regulatory Flexibility Act and the Endangered Species Act require the Secretary of Interior to consider the economic harm the rule could do, and the Endangered Species Act specifically allows the Secretary to exclude your area from the final rule if the economic costs outweigh the benefits to the species. You should also send your comments to the Office of Advocacy to include in our discussions with agency officials on small business impacts.
- **What should I include in these comments?** First, if the PCEs are not present on your land, you should tell the agency and request exclusion. Second, if PCEs are present, you should explain the economic harm the rule could inflict on your business and request exclusion. Provide dollar figures and impacts on jobs where possible, and make sure to include the location of the land.

For more information, visit Advocacy's Web page at: <http://www.sba.gov/advo>, or contact assistant chief counsel Michael See by email at michael.see@sba.gov or by phone at (202) 619-0312.

***Suggested Check List for Comments
on Critical Habitat Rules***

1. General Considerations.

- ☐ **Does the introductory paragraph state the desired outcome?**
- ☐ **Tone.** Is the tone of the piece measured, reasonable, and factual?
- ☐ **Have you remembered to include a useful description of where the land in question is located?**
- ☐ **Confidential Business Information.** Do not include confidential business information in your comments, except to the extent you are comfortable with this information's public release. All comments are public information. If you have comments with confidential business information that you do not wish to release publicly, contact the Office of Advocacy.
- ☐ **Addresses.** Make sure to address your comments to the U.S. Fish and Wildlife Service contact listed in the proposed rule *and* to send a copy to the office of the Assistant Secretary for Fish, Wildlife, and Parks in the Department of the Interior.

2. Scientific Basis.

- ☐ **Are the Primary Constituent Elements present on the land in question?** If the land does not have the features FWS identified in the proposed rule as necessary to support the species, you should make this clear in your comments.
- ☐ **Is the land currently occupied by the species?** If not, point this out.

3. Economic Harm.

- ☐ **Have you explained what Federal connection there is to your land that could require you to get approval from FWS?** Make sure to explain the specific type of Federal connection (e.g., your project will require a wetlands permit from the Army Corps of Engineers).
- ☐ **Have you included a general estimate of value of the activity you are engaged in?** This estimate is the cost of the rule to you if your activity is later prohibited by FWS.
- ☐ **Is there a rough estimate of the cost of delay?** Consultation can usually take anywhere from a few months to a few years. Explain how this would affect your business.
- ☐ **Are your cost estimates in concrete terms?** The Office of Advocacy recommends including general dollar estimates of how consultation or project restriction could affect your business.
- ☐ **Have you explained how designation under the Federal Endangered Species Act will have legal and other consequences under state and local law?**